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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 232

H. W. KELLEY, ET AL.,

Petitioners,

vs.

EVERGLADES DRAINAGE DISTRICT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

MILLER WALTON,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 232

H. W. KELLEY, ET AL.,

Petitioners,

vs.

EVERGLADES DRAINAGE DISTRICT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioners, H. W. Kelley, Renata Titus; Renata M. Titus and Stephen Titus, by James C. Titus, their guardian ad litem; James C. Titus, as such guardian ad litem; Kathleen Wall and Tudor A. Wall, respectfully show this Court:

I.

Statement of the Matter Involved.

This is a Petition for a Writ of Certiorari to The United States Circuit Court of Appeals for the Fifth Circuit, to

review a decision whereby that Court (R. 215) affirmed an order denying motions which attacked the jurisdiction of the District Court in a municipal composition proceeding under Chapter IX of the Bankruptcy Act.

Petitioners contend that when the Petition for Confirmation was filed, and also when successive orders were entered approving the Petition for Confirmation as properly filed, the District Court did not have jurisdiction of the subject matter of the proceeding, because the Plan of Composition had not been accepted in writing by creditors owning at least 51% in amount of the securities affected by the plan, as required by Sec. 83(a) of the Act. They further contend that the constructive process issued under these circumstances was void, and that the District Court did not have jurisdiction of the persons of five appellants who did not appear generally.

On June 13, 1941, Respondent filed in the District Court a Petition for Confirmation of a Plan of Composition thereto attached as Exhibit "A" (R. 1-34). The petition alleged that the Plan had been accepted in writing by creditors owning more than 51% in amount of the indebtedness affected (R. 2). There was also attached to the petition the "list of all known creditors" required by Sec. 83(a), "showing separately those who have accepted the plan" (R. 35-83). The Ranson-Davidson Co. was the only creditor shown as having accepted (R. 35-70).

Respondent exhibited to the District Judge (R. 144), a written acceptance wherein the Ranson-Davidson Investment Company recited that it was "the owner of certain bonds of Everglades Drainage District, aggregating in principal amount $7,005,000.00," and was also "the owner of certain notes executed by The Everglades Drainage District in favor of The Arundel Corporation in the principal amount of $1,825,685.66" (R. 161). The acceptance stated:

"The undersigned accepts and consents to the Plan of Composition" (R. 161).

The District Court entered an Order June 13, 1941, finding that the petition complied with the act, and had been filed in good faith. The order approved the petition as properly filed, and directed the service by publication and mailing of a "Notice to Creditors" (R. 83-85). On June 19, 1941, a further order was entered finding that the petition complied with Chapter IX of the Act, and had been filed in good faith. The order approved the petition as properly filed, directed the service by mailing and publication of a "Notice to Creditors", and recited that it was entered in lieu of the order of June 13 (R. 88-90).

H. W. Kelley moved the Court to vacate the orders of June 13 and 19, and to dismiss the Petition, on the ground that The Ranson-Davidson Co. was not, and had never been, the owner of at least 51% in amount of the securities affected by the plan, and therefore, when the petition was filed, and when the successive orders were entered approving it as properly filed, the plan had never been accepted in writing by creditors owning the requisite percentage of the securities affected (R. 126-129). The other five petitioners made the same motion, and also moved the Court to quash the purported process (R. 130-131).

The verified allegations of the motions were to this effect: The bonds of which The Ranson-Davidson Investment Company claimed to be the owner, had been deposited by their true owners, including petitioners herein, with a bondholders' protective committee, under a deposit agreement which made the committee members trustees of an express trust. The deposit agreement defined and limited the powers of the trustees, and expressly provided that the deposited bonds could not be sold for less than par value, until thirty days advance written notice of the terms of the proposed sale had been given to the depositing owners, except

that the trustees could unilaterally amend the agreement so as to authorize a sale of the deposited bonds at less than par value, but such amendment would not become effective until thirty days written notice had been given to the depositing owners (R. 91-95). On June 6, 1941, seven days before the Petition for Confirmation was filed, the trustees purported to sell the deposited bonds, including those of the Appellants, to a syndicate composed of B. J. Van Ingen Company, Inc., Syndicate Manager, The Ranson-Davidson Company, Inc., John Nuveen & Company, and Fenner & Beane, for a price considerably less than par value (R. 96-100). On the same day, the trustees unilaterally amended the agreement to authorize the purported sale (R. 100-102) and gave the depositing owners written notice of the purported sale and of the amendment (R. 95-102). Neither the purported sale nor the amendment had become effective June 12, 1941, when The Ranson-Davidson Investment Company executed its consent as owner of the bonds, including the bonds owned by petitioners (R. 115), nor on June 13, 1941, when the petition was filed and the original order was entered approving it as properly filed, nor on June 19, 1941, when the second order was entered approving the petition as properly filed (R. 102-117, 126-128, 130-131). By reason of the matters stated, the syndicate members had not become the owners of the bonds at any of the times mentioned, and title thereto remained vested in the trustees, but if any title did pass by reason of the purported sale and the amendment, or either, it passed to the four syndicate members, including The Ranson-Davidson Company, Inc., as joint owners, and was never vested in The Ranson-Davidson Investment Company (R. 102-117, 126-128, 130-131). Consequently, when the acceptance was executed, when the petition was filed, and when the successive orders were entered approving the petition as properly filed, The Ranson-Davidson Investment Company did not own the requi-

site percentage of securities affected by the plan, and the latter had not been accepted in writing by the owners of the necessary percentage of securities.

The Motions were heard September 29, 1941 (R. 133). The District Court ruled that the burden of proof to establish jurisdiction was on Respondent (R. 147). The latter called S. H. Ranson, Jr., as a witness on its behalf (R. 149). He testified: I am Vice-President of Ranson-Davidson Company (R. 149). The name was recently changed from Ranson-Davidson Investment Company to Ranson-Davidson Company, Inc. (R. 149). The Bonds were purchased from the committee by the B. J. Van Ingen Company, Incorporated, Fenner & Beane, John Nuveen & Company, Inc., and Ranson-Davidson Company, Inc. (R. 150-151). My company had only a 28% undivided ownership in them (R. 151). B. J. Van Ingen & Company had a 28% undivided ownership, John Nuveen & Company had a 28% undivided ownership, and Fenner & Beane had a 16% undivided ownership (R. 151). This situation existed at the time the acceptance was executed by The Ranson-Davidson Investment Company. The acceptance is predicated partially on interest coupons which are in judgment (R. 152-153). The title to the judgment was in Van Ingen Company at the time the acceptance was signed (R. 154).

No evidence was adduced to overcome the verified allegations of the Motions concerning the limited powers of sale conferred by the Deposit Agreement. The verified allegations of the terms of the Deposit Agreement, and of the date, terms and manner of sale, were uncontradicted. The verified allegation that the acceptance included the Bonds owned by Petitioners was also uncontradicted.

In addition to the testimony of Mr. Ranson, Respondent adduced, and the District Court admitted in evidence:

1) the acceptance executed by The Ranson-Davidson Investment Company (R. 161); 2) an instrument which had not been exhibited to the Court at any prior time, dated June 10, 1941, executed by each of the four syndicate members, authorizing The Ranson-Davidson Investment Company or S. H. Ranson, Jr., its vice-president, or both, "to execute on behalf of said Syndicate and each of the members thereof, a consent or acceptance of" the Plan of Composition, "in such form, and as fully, as though The Ranson-Davidson Investment Company, or S. H. Ranson, Jr., were the sole owner of said bonds or notes" (R. 164-165); 3) an instrument executed by each of the four syndicate members, wherein "the act of The Ranson-Davidson Investment Company and of S. H. Ranson, Jr., in accepting the Plan of Composition", was "fully ratified on behalf of said Syndicate and on behalf of each of the members thereof" (R. 166-167).

The District Court denied the Motions (R. 161, 170-171), allowed the Petitioners ten days from September 29, 1941, to file Answers and Objections, appointed a Master to take testimony and report his Findings of Fact and Conclusions of Law, and directed that the taking of testimony before the Master begin October 1, 1941 (R. 171-172).

Petitioners appealed from the Order denying the Motions and appointing the Master (R. 172).

On October 1, 1941, at the subsequent hearing before the Master, Respondent submitted a number of additional acceptances, including an acceptance by Reconstruction Finance Corporation as the purported purchaser, pendente lite, of the greater part of the bonds involved in the attempted sale by the bondholder's committee (R. 177, 181, 183). All of the additional acceptances were obtained after the Petition for Confirmation had been filed, and after the successive orders were entered approving the Petition as properly filed, and after Petitioners herein had moved

to dismiss the Petition. The additional acceptances were not presented to or before the District Court when the Motions to Dismiss were denied (R. 177-187).

On April 13, 1942, Respondent moved to dismiss the Appeal, or, in the alternative, to postpone the hearing thereof until an Appeal should be taken from the Interlocutory Decree which had been subsequently rendered by the District Court (R. 194-196). Attached to the Motion was a certified copy of an extract from the Report of the Master (R. 197) and a certified copy of the Interlocutory Decree Confirming Plan of Composition, as amended (R. 200-207).

On May 7, 1942, the Circuit Court of Appeals affirmed the Order of the District Court (R. 215) because: (a) the contentions of Petitioner are technical in the extreme; (b) it is not shown that Ranson-Davidson Company attempted to consent to the Plan of Composition for the bonds owned by any objecting creditor; (c) the members of the syndicate did not object to, but expressly authorized, ratified and approved the action taken by Ranson-Davidson Company; (d) the holders of over 90% in amount of the indebtedness consented to and accepted the Plan; (e) the holders of only 2½% of the indebtedness objected to confirmation of the Plan; (f) after the filing of the Petition for Confirmation, Reconstruction Finance Corporation was authorized by the Court to acquire the bonds held by Ranson-Davidson Company, and thereafter acquired the bonds and accepted the Plan; (g) the appeal did not raise issues respecting the equity or fairness of the Plan, which had been confirmed by the District Court after the coming in of the Master's Report and a hearing; (h) no good purpose could be served by reversing the cause for alleged technical defects in and about the filing of the Petition, and requiring Respondent to start over again at the beginning, as such procedure would result in much

delay and would put Respondent and the creditors to additional, unnecessary, and useless expense; (i) the issues of fact and of law raised by the Motions to Dismiss were fully heard and considered by the trial Court, and its ruling was fully supported.

Petition for Rehearing was filed May 26, 1942 (R. 219), and denied June 2, 1942 (R. 224).

II.

Statement of Jurisdiction.

The jurisdiction of this Court is invoked under Sec. 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (28 U. S. C. A. 347), providing for the issuance of writs of certiorari by the Supreme Court of the United States to review judgments of the Circuit Court of Appeals.

The decision of the Circuit Court of Appeals was rendered on May 7, 1942 (R. 218). A Petition for Rehearing, filed May 26, 1942, was denied June 2, 1942 (R. 224). This Petition for writ of certiorari is filed July 14, 1942.

The questions presented are substantial in that they attack the jurisdiction of the District Court as a Court of Bankruptcy.

The District Court, subsequent to the Order denying Petitioners' Motions to Dismiss, confirmed the Plan of Composition (R. 200). It is not known how much it would cost Petitioners to appeal from the Interlocutory Decree, but it is estimated that the cost would be approximately $5,000.00, and if Petitioners' contention on the question of jurisdiction is well founded, the Interlocutory Decree is void.

III.

Questions Presented.

This Petition presents the following questions:

1. When a Petition is filed under Sec. 83(a) of the Bankruptcy Act for the confirmation of a Plan of Composition which has not been accepted in writing by the owners of at least 51% in amount of the securities affected, does the District Court acquire jurisdiction of the subject matter of the proceeding?

2. When a Petition for confirmation of a Plan of Composition is filed under the circumstances stated in the first question, and Motions to Dismiss the Petition are made before the Plan of Composition is accepted in writing by the owners of the required percentage of the securities affected, should the Petition be dismissed?

3. When a Petition for confirmation of a Plan of Composition is filed under the circumstances stated in the first question, can the subsequent purported ratification of an ineffective acceptance, or the subsequent obtaining of acceptances from the owners of the required percentage of the securities affected, retroactively confer jurisdiction of the subject matter and of creditors who did not appear generally?

IV.

Reasons Relied On for Allowance of Writ.

Petitioners respectfully submit that the decision of the Circuit Court of Appeals for the Fifth Circuit:

(a) Is in conflict with the rule announced in *Ouerbacker* v. *Henderson County*, 4 Cir., 126 F. 2d 309.

(b) Countenances an exercise of power by the District Court in excess of the limited jurisdiction conferred by the Bankruptcy Act.

(c) By giving as its rationale that to reverse the District Court "would result in much delay, and would put the District and the creditors to additional, unnecessary, and useless expense," is a premature pronouncement that the Plan of Composition complies with the requirements of the Act (other than the deficiency of initial acceptances) and is so far afield from the usual and accepted course of judicial procedure as to call for the exercise of the Supreme Court's power of supervision.

(d) Imposes on Petitioners the burden of expending a further sum of approximately $5,000.00 to appeal from an Interlocutory Decree which the District Court was without power to render.

V.

A certified copy of the entire record of said case in the said Circuit Court of Appeals is herewith exhibited, and made a part hereof, in compliance with Rule 38 of this Court.

Wherefore, your petitioner prays that a Writ of Certiorari may issue out of and under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send up to this Court a full and complete transcript of the record and proceedings of the said Circuit Court of Appeals in the case numbered and entitled on its Docket No. 10,111, H. W. Kelley and others, Appellants, versus Everglades Drainage District, Appellee, to the end that said cause may be reviewed and the manifest errors of the Honorable Circuit Court of Appeals be revised and

corrected, as provided by law; that upon the hearing by this Honorable Court, the judgment below be reversed, and that such further proceedings be held herein as may be provided by law and equity.

MILLER WALTON,
Attorney for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. 1942

No. 232

H. W. KELLEY, ET AL.,

Petitioners,

vs.

EVERGLADES DRAINAGE DISTRICT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 215), rendered on May 7, 1942, has not yet been reported. A petition for rehearing, filed in said Circuit Court of Appeals on May 26, 1942 (R. 219), was denied June 2, 1942 (R. 224).

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended by Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (28 U. S. C. A. 347),

providing for the issuance of writs of certiorari by the Supreme Court of the United States to review judgments of the Circuit Courts of Appeals.

III.

Statement of the Case.

The nature of the case and the decision of the Circuit Court of Appeal for the Fifth Circuit are set forth in the foregoing petition (pp. 1-8), which, in the interest of brevity, is adopted as a part of this brief.

IV.

Specifications of Error.

The Circuit Court of Appeals erred in the following respects:

1. In affirming the order of the District Court.

2. In sanctioning the exercise of power by the District Court in excess of the limited jurisdiction conferred by the Bankruptcy Act.

3. In failing to pass on the errors assigned and in holding that to reverse the District Court or compel the Petitioner to follow the procedure required by the Act "would put the district and (consenting) creditors to additional, unnecessary and useless expense."

4. In finding that it is not shown that Ranson-Davidson Company attempted to give consent to the Plan of Composition for the bonds owned by the Petitioners herein.

ARGUMENT IN SUPPORT OF PETITION.

Point I.

The decision of the Circuit Court of Appeals is in conflict with the rule announced in Ouerbacker v. Henderson County, 4 Cir., 126 F. 2d 309.

The Circuit Court of Appeals for the Fourth Circuit in *Ouerbacker* v. *Henderson County, supra,* decided Feb. 23, 1942, announced the rule that when timely objection is made because creditors owning not less than 51% in amount of the securities affected by a Plan of Composition had not accepted it in writing when the petition for confirmation was filed, the objection is one of substance, and if a Motion to dismiss the petition is made before acceptances are received, or if the deficiency otherwise comes to the attention of the District Judge, a dismissal of the petition is required.

The facts in the instant case bring it squarely within the rule, in that motions to dismiss were filed September 5, 1941 (R. 126 and 130), before the attempted ratification, on September 19, 1941, of the ineffective acceptance (R. 167), and before the acceptance of Reconstruction Finance Corporation was signed on September 18, 1941 (R. 180), and before the acceptances of other creditors were signed, and if the acceptances of Reconstruction Finance Corporation and the other creditors had been obtained before the motions to dismiss were denied September 29, 1941, they had not been, and were not then, presented, filed, or otherwise called to the attention of the District Court (R. 180 and 181), but were filed October 1, 1941, at the subsequent hearing before the Master (R. 177-187).

Point II.

The decision of the Circuit Court of Appeals countenances an exercise of power by the District Court in excess of the limited jurisdiction conferred by the Bankruptcy Act.

The decision violates the principle that the grant of jurisdiction to the District Court is not general, but is limited

and confined by the terms of the Act. Chapter IX of the Bankruptcy Act confers jurisdiction of a petition filed by a public debtor when, and only when, the accompanying Plan of Composition has been accepted in writing by the owners of not less than 51% in amount of the securities affected. Unless and until the plan has been so accepted, the petition cannot be filed, and if filed before having been so accepted, the only jurisdiction the Court can exercise is to dismiss it as soon as the facts become known.

Section 83(a) of the Bankruptcy Act requires that:

> "The Petition shall state that a plan of composition has been prepared, is filed and submitted with the petition, and that creditors of the petitioner owning not less than 51 per centum in amount of the securities affected by the plan (excluding, however, any such securities owned, held, or controlled by the petitioner), have accepted it in writing."

Clearly the intent of the Congress was that advance acceptance in writing by the owners of not less than 51% in amount of the securities affected was a prerequisite to the right of the taxing agency to file its petition at all. 10 Remington on Bankruptcy 241, Sec. 4348. Annotation, 79 L. Ed. 1133, 1170, 1183.

This prerequisite is unquestionably jurisdictional, the intent being that a Public Debtor shall not be permitted to invoke the jurisdiction of the District Court, and that the latter shall not have jurisdiction to entertain the proceedings, unless the Plan of Composition has been accepted by the owners of the requisite percentage of securities affected. In 81 Cong. Rec., June 24, 1937, at page 8210, speaking for H. R. 5969, just prior to its adoption by the

House, Mr. Wilcox, one of the authors of the Bill, used the following significant language:

> "The municipality cannot go into Court until it has gotten 51 percent of its debt to agree to the settlement. It then submits the entire plan to the Federal District Judge, * * *."

At page 8213, in this same debate, it was said:

> "In the first place, a composition which may be later presented to the Court must initiate with the creditors themselves. Before the creditors can go to Court and invoke the relief provided under this bill, 51 percent of them must have agreed upon a Plan of Composition. After a plan has been agreed upon by 51 percent of the creditors, a petition may be filed in voluntary bankruptcy by the agency which is unable to pay its debts in the ordinary course. * * *"

In the report of the Committee on the Judiciary of the House of Representatives (H. Rep. No. 517, 75th Cong., 1st Sess.), which was adopted by the Senate Committee on the Judiciary (Sen. Rep. No. 911, 75th Cong., 1st Sess.), quoted with approval in *United States* v. *Bekins*, 304 U. S. 27, 50, the Committee said:

> "Compositions are approvable only when the districts or agencies file voluntary proceedings in courts of bankruptcy, accompanied by plans approved by 51 percent of all the creditors of the district or agency, and by evidence of good faith. * * *"

In the case of *In Re City of West Palm Beach*, 5 Cir., 96 F. 2d 85, the Petition for Confirmation, like the Petition in the instant case, alleged that the Plan of Composition had been accepted by the holders of 51% in amount of the securities affected, but the allegations were adjudged to be untrue. For that reason, the District Court dis-

missed the Petition, which ruling was affirmed by the Circuit Court of Appeals.

It is submitted that the question of the jurisdiction of the subject matter of municipal composition proceedings conferred on District Courts by Chapter IX of the Bankruptcy Act, is an important question of Federal Law, which has not been, but should be, decided by the Supreme Court.

POINT III.

The decision of the Circuit Court of Appeals by giving as its rationale that to reverse the District Court "would result in much delay, and would put the District and the creditors to additional, unnecessary, and useless expense", is a premature pronouncement that the Plan of Composition complies with the requirements of the Act (other than the deficiency of initial acceptances) and is so far afield from the usual and accepted course of judicial procedure as to call for the exercise of the Supreme Court's power of supervision.

The Circuit Court of Appeals in affirming the Order of the District Court denying the Motions to Dismiss, treats the failure of Petitioner below to first acquire and submit with its Petition for confirmation the requisite number of consents as "alleged technical defects in and about the filing of the Petition" and observes that "no good purpose could be served by reversing the cause * * *" and that "such procedure would result in much delay, and would put the District and the creditors to additional, unnecessary, and useless expense." (R. 217.) It thereby sanctions a departure from the fundamental rule that jurisdiction of the Federal Court must be determined by the situation as it existed at the time the action was filed. Mr. Chief Justice Marshall, speaking for the Court in *Conolly* v. *Taylor*, 2 Pet. 565, said:

> "They (Defendants) contend that jurisdiction depends on the state of the parties at the commencement of the suit, and that no subsequent change can give or take it away. They say that if an alien becomes a citizen pending the suit, the jurisdiction which was once vested is not divested by this circumstance. So, if a citizen sue a citizen of the same State, he cannot give jurisdiction by removing himself and becoming a citizen of a different State."
> "This is true * * *."

The reasoning of the decision of the Circuit Court of Appeals overlooks the fact that Petitioners are not chargeable with laches and have gone to great trouble and expense to perfect and present their Appeal, and they should not be denied their remedy merely because the District Court, during the pendency of the Appeal, proceeded to render a void decree.

Such reasoning is contrary to applicable decisions of this Court. In *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, to a rule entered in the bankruptcy court, requiring an adverse claimant in possession of a fund to pay it to the trustee in bankruptcy, the claimant tendered a formal response, denying the bankruptcy court's jurisdiction, which the Court refused to entertain. The claimant then participated in the hearing on the merits. The bankruptcy court sustained its jurisdiction upon the ground that, by his acquiescence in the mode of procedure, he assented to its jurisdiction. Upon petition for review the Circuit Court of Appeals reversed the bankruptcy court, and the Supreme Court, upon certiorari, affirmed the Circuit Court of Appeals, saying:

> "The question is whether the district court had jurisdiction to finally adjudicate the merits of this proceeding * * *.
> "In many cases jurisdiction may depend on the ascertainment of facts involving the merits, and in that

sense the Court exercises jurisdiction in disposing of the preliminary inquiry, although the result may be that it finds that it can go no farther. And where * * * the court erroneously retains jurisdiction to adjudicate the merits, its action can be corrected on review."

Point IV.

The decision of the Circuit Court of Appeals imposes on Petitioners the burden of expending a further sum of approximately $5,000.00 to appeal from an Interlocutory Decree which the District Court was without power to render.

The decision of the Circuit Court of Appeals is based largely, if not entirely, on the acceptances obtained after the making of the Motions to Dismiss and on the Interlocutory Decree rendered by the District Court during the pendency of the appeal taken by Petitioners herein. It assumes, without the record of the proceedings before it, that the Interlocutory Decree is without error, and imposes on Petitioners the burden of expending a further sum of approximately $5,000.00 to appeal from an Interlocutory Decree which the District Court was without power to render.

Respectfully submitted,

Miller Walton,
Attorney for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 232

H. W. KELLEY, ET AL.,

Petitioners,

vs.

EVERGLADES DRAINAGE DISTRICT,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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EVERGLADES DRAINAGE DISTRICT,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THE OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 215), in this case is reported in *127 F. (2d) 808, Advance Sheet, June 22, 1942.*

JURISDICTION

Petitioners' brief seeks to have this Court exercise its discretionary power of review by certiorari of the decision of the Circuit Court of Appeals affirming the District Court of the Southern District of Florida.

The brief sets forth no reasons why jurisdiction should be exercised but makes reference to the petition and notably the chief reason assigned is the estimated cost of Petitioners' appeal from the decree upon the merits which has been rendered by said District Court and is now on appeal to the Circuit Court of Appeals.

STATEMENT OF THE CASE.

For the purpose of correcting what we consider to be inaccuracies and omissions in the statement of Petitioners' case, we submit the following:

A sworn Petition for Confirmation of Plan of Composition was duly filed by the District alleging that creditors owning more than fifty-one per cent (51%) of its indebtedness had accepted said Plan (R. 1-4). The District Court entered an order that the petition be approved as properly filed (R. 88). Thereafter, Petitioners sought and obtained an extension of time in which to file objections and answers (R. 121); instead of filing answers and objections, they filed motions to vacate the order approving the petition as properly filed and to dismiss the Petition on the ground that the required 51% of the indebtedness had not been committed to the plan at the time the petition was filed because:

(A) The only creditor who had signed a consent at that time (The Ranson-Davidson Company, Inc.) had purchased the bonds from a Bondholders' Committee which, Petitioners alleged, did not have authority to pass title until the expiration of thirty (30) days' notice by the Committee to those who had deposited bonds with it;

(B) In the alternative, if title did pass, it passed to a syndicate consisting of The Ranson-Davidson Company, Inc., and three other companies, and, they alleged, The Ranson-Davidson Com-

pany, Inc., did not have authority to consent for the Syndicate. (R. 126-132; 91-120).

The Court received evidence concerning such factual allegations (R. 149-161), denied the motions, and appointed a Master to hear the case upon the merits (R. 170-172).

The hearing before the Special Master on the merits of the Plan of Composition began on September 30, 1941, and was completed on December 1, 1941, with Petitioners as principal objectors.

On March 3rd, 1942, the Master filed a report recommending confirmation of the Plan and finding that:

> "More than ninety per cent (90%) of the holders of both classes of debts have consented to, and accepted the Plan in writing. Some holders of both classes of debts, have taken no stand either for or against it. About two and one-half per cent (2½%) of the holders of debts, of both classes, are objecting to its confirmation." (R. 197-198).

On March 27, 1942, the Court approved the report and adopted the findings of the Master; and on April 6, 1942, the Trial Court entered the Interlocutory Decree confirming the Plan of Composition. (R. 200-207).

All of these facts are accurately and succinctly recited in the opinion of the Circuit Court of Appeals, and that Court now has before it the Petitioners' appeal from the Decree upon the merits.

ARGUMENT.

Before replying to the points of argument in Petitioners' brief, we submit that there is absolutely no jurisdictional question involved. Neither the petition nor the brief assign any reason why this Court should at this stage of the proceedings consider this case. It is just another instance of a case condemned by this Court where, speaking through Mr. Chief Justice Taft, it was

said "jurisdiction to issue writs of certiorari was not conferred merely to give the defeated party in the Circuit Court of Appeals another hearing." *MAGNUM IMPORT COMPANY vs. HOUBIGANT, INC., 262 U. S. 159, 43 S. Ct. 531, 67 L. Ed. 922, 924.*

POINT I.

The opinion in OUERBACKER v. HENDERSON COUNTY, 4 Cir., 126 F. (2d) 309, is relied upon by the Petitioners to present a conflicting opinion by the two circuit courts of appeals. The facts are not comparable as was recognized by the Fifth Circuit in the opinion written in the instant case because that opinion was cited as authority for the decision here under attack.

In their Argument on this point, the Petitioners entirely overlook the fact that the Syndicate members expressly authorized the execution of the acceptance or consent under date of June 10, 1941 (R. 164-165).

The Petitioners have also completely ignored the acceptance or consent executed under date of June 12, 1942 (R. 161-162) by one of the syndicate members under authority of the above mentioned authorization.

The record clearly shows that the Petition alleged that the requisite amount of claims had been committed to the plan; and, both the District Court and the Circuit Court of Appeals found that the Plan had been sufficiently accepted before the filing of the Petitioners' technical motions.

The burden of the Petitioners' Argument is that the Bondholders' Committee sold the bonds to the Syndicate before it was authorized to do so.

Petitioners, however, had no right to raise the objection that the bonds of other Committee depositors had not been sold lawfully. The trust agreement was between the depositing bondholders and the Committee

for "the depositors, each for himself, but not for the others, or any of them."

The same trust agreement was before the Court of Appeals of Ohio in *BECHTEL v. RORICK, 30 N. E. (2d) 451,* in which a small group of depositors were trying to assert rights on behalf of themselves and all other depositors. The Court held that each bondholder could speak only for himself, and not for the others, in view of the provision quoted in the above paragraph from the agreement.

Moreover, Petitioners' motions and the generous quotations therein show that authority to make the sale of the bonds was given to the Committee separately and in addition to that conferred by the amendment to the agreement, and that such authority existed at the time of the sale, which was before the Petition was filed.

Petitioners' Motions show:

(1) Prior to June 6, 1941, there had been deposited with the Committee $8,073,000.00 of bonds, $51,000.00 thereof had been paid, leaving $8,022,000.00; (R. 96)

(2) On April 24, 1941, the Committee requested written authority from its depositors to make the sale of the bonds; (R. 96)

(3) By June 6, 1941, such written authority had been received; (R. 96) except as to some of the depositors (R. 98)

(4) On June 6, 1942, pursuant to such authority, the sale of the bonds was made; (R. 96)

(5) Some of the depositors did not give the written authority so requested, and it became necessary to adopt the amendment to the trust agreement so that those who had not given the direct written authority could either with-

draw within the thirty days, or consent by not withdrawing. (R. 98)

(6) On June 6, 1941, when the bonds were sold to the Syndicate, the Committee reserved the right to repurchase any bonds, the depositors of which elected to withdraw within the thirty day period (R. 98)

(7) Petitioners elected to withdraw their bonds. (R. 102).

This shows that the holding in this case is not in conflict with the rule announced in the Ouerbacker case because *even under the Petitioners' contentions, title to the bonds passed out of the Committee into the Syndicate thirty days after June 6, 1941, which was two months before the Petitioners filed their motions.* In other words, the facts bring this case squarely within the rule announced in the Ouerbacker case, because the Motions were not filed until after the title passed, which made the acceptance good even though we admit (which we do not) that title did not pass until thirty days after June 6, 1941. This is exactly what happened in the Ouerbacker case—the acceptances were secured and filed after the Petition was filed, but before the objection was raised, so, the Court said: (Text 314)

> " * * * As it was, no objection on this score was made until the answer of the appellant was filed on July 26, 1941, and the motion to dismiss was not made until the final hearing on September 4, 1941; and *in the meantime, as we have seen, acceptances of the plan in composition had been received from the holders of more than 93 per cent of the bonds, that is, sufficient acceptances not only to support the petition, but also to justify the decree. Under the circumstances,* we think that *the District Judge properly refused the motion to dismiss.* It must be borne in mind that the plan of composition was the same in effect as the 1940 plan which a short time before had been presented

> to and accepted by the bondholders; and that the requirements of the Act had been met by the written acceptance of an overwhelming majority of the creditors, there being but one objector, and that *the objection could have been met completely on September 4, 1941, merely by refiling the petition.*"
>
> *(Italics Ours)*

It would have been mere idle ceremony to have required the refiling of the Petition. The familiar maxim, lex non cogit ad vana sev inutilia, is particularly applicable.

The Circuit Court of Appeals for the Fifth Circuit might well have said what the Circuit Court of Appeals for the Fourth Circuit said in the last paragraph of its opinion in the Ouerbacker case, text 316, viz:

> "We reach the conclusion, after a consideration of all the arguments which the sole objecting bondholder has taken great pains to offer, that the case is of the precise kind that the Municipality Bankruptcy Act was intended to meet, to the end that the efforts of a municipality and its creditors co-operating in good faith to readjust its financial difficulties will not be defeated without good cause by a recalcitrant minority, no matter how persistent."

The Petition for Confirmation had attached to it an exhibit showing a consenting creditor, The Ranson-Davidson Co.—$7,005,000.00, (R. 35). The list of non-consenting creditors included The Ranson-Davidson Co. (Conditional Title)—$1,017,000.00. R. 71). The "conditional title" bonds were those which the Committee reserved the option to repurchase as mentioned in paragraph (6) above. Full evidence on this transaction was introduced at the hearing in the Trial Court.

The $7,005,000.00 of bonds thus committed to the Plan, together with the $1,017,000.00 "conditional title"

bonds aggregate the $8,022,000.00 of bonds held by the Committee (R. 99). While it is true that the Petitioners' bonds, in the approximate amount of $222,000.00, were erroneously placed in the $7,005,000.00 list of bonds sold outright to the Syndicate, when Petitioners had not given a direct written authorization to the Committee, no harm was done; and the result was not affected because the Petitioners owned only about two per cent (2%) of the bonded indebtedness. The bonds had been sold to the Reconstruction Finance Corporation before the Syndicate was advised of the error and of the Petitioners' election to withdraw. The Petitioners refused to accept substitute bonds deposited (R. 112). Thereafter, the Reconstruction Finance Corporation redelivered the identical bonds to the Committee for their return to Petitioners.

S. H. Ranson, Jr., Vice-President of The Ranson-Davidson Company, testified that the Syndicate of his company and three others purchased the bonds prior to the signing of the consent to the Plan (R. 150; 149), and that the bonds had been delivered to him at that time (R. 150; 149).

After the Reconstruction Finance Corporation purchased the bonds from the Syndicate, it executed a new acceptance of the Plan, at which time, it owned over 90% of the entire debt (R. 177).

POINT II.

The decision of the Circuit Court of Appeals DOES NOT countenance an exercise of power by the District Court in excess of the limited jurisdiction conferred by the Bankruptcy Act.

It is noted that no authorities are cited by the Petitioners in support of their contention that the required acceptance of the plan is a jurisdictional prerequisite to the filing of the Petition; but be that as it may, the

point is purely academic because, admitting for the sake of argument that the 51% requirement is jurisdictional, it is beside the question for the reason that the requirement was fully met when the Petition was filed. The District Court and the Circuit Court of Appeals properly so found.

2 AM. JUR. 944, aptly says:

> "Appeals are not allowed for the purpose of settling abstract questions, however interesting or important to the public generally, but only to correct errors injuriously affecting the appellant."

POINT III.

The Petitioners have misconceived the rationale of the decision of the Circuit Court of Appeals.

A mere cursory reading of the decision will show that the following excerpts therefrom is the real rationale thereof: (Text 809-810)

> "It is not shown that Ranson-Davidson Company attempted to give consent to the plan of composition for the bonds owned by any objecting creditor. Members of the syndicate have made no objection to the consent given, and it appears that they expressly authorized, ratified, and approved the action taken by Ranson-Davidson Company. Indeed, it appears that holders of over ninety per cent in amount of the District's indebtedness consented to and accepted the plan, and that, including these appellants, holders of only two and one-half per cent of the indebtedness objected to confirmation of the plan of composition. Moreover, after acceptance of the plan by Ranson-Davidson Company and the filing of the petition, Reconstruction Finance Corporation was authorized by the court to acquire the bonds

held by Ranson-Davidson Company, and thereafter Reconstruction Finance Corporation accepted the proposed plan of composition in writing.

"* * * The issues of fact and of law raised by the motions to dismiss were fully heard and considered by the trial court. Its ruling was fully supported and will not be disturbed. See Ouerbacker v. Henderson County, 4 Cir., 126 F. 2d 309."

The decision does not *concede* that the contentions of the Petitioners are "technical defects" but refers to them as "alleged technical defects", (127 F. (2d) 808). The Circuit Court of Appeals is to be commended for brushing such "alleged technical defects" aside. The spirit of all modern judicial reform is in that direction.

POINT IV.

The decision of the Circuit Court of Appeals imposes no burdens on the Petitioners.

There is no obligation on the Petitioners to appeal from the Interlocutory Decree. They fail to show wherein they are so obligated. But most significantly they have not shown how they are prejudiced by the decision of the Circuit Court of Appeals.

3 AM. JUR. 555, 559, states:

"It is a fundamental rule of modern appellate procedure that in order to warrant a reversal, the error complained of must have been prejudicial to the substantial rights of the appellant or plaintiff in error. Error going only to immaterial, minor, or technical questions is not ground for reversal, especially where it does not touch the controlling questions, or where controlling questions are correctly decided. In other words, an appellate court will not search

for reasons to reverse a case; the duty rests upon the appellant or plaintiff in error to show that error has intervened to his prejudice."

The Circuit Court of Appeals therefore properly said: (Text 810)

"(3, 4) This appeal does not raise issues respecting the equity or fairness of the plan of composition which was confirmed by the trial court after the coming in of the master's report and a hearing, and no good purpose could be served by reversing the cause for *alleged* technical defects in and about the filing of the petition and requiring the District to start over again at the beginning. Such procedure would result in much delay, and would put the District and the creditors to additional, unnecessary, and useless expense."

(Italics Ours)

CONCLUSION

There is no occasion for the granting of a writ of certiorari to review the decision of the Circuit Court of Appeals because that decision is not in conflict with the rule announced in *OUERBACKER v. HENDERSON COUNTY*, 4 *Cir.*, 126 *Fed.* (2*d*) 309, and did not countenance an exercise of power by the District Court in excess of its jurisdiction, so the Petition ought to be denied.

Respectfully submitted,

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